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2015 TITLE 20 UPDATES TO PROCESS REGULATIONS

Final Statement of Reasons

CALIFORNIA
ENERGY COMMISSION

Edmund G. Brown Jr., Governor

FINAL STATEMENT OF REASONS

PROPOSED AMENDMENTS TO
California Code of Regulations, Title 20,
Sections 1000, 1100, 1200, 1600, 1700 and 2000

CALIFORNIA ENERGY COMMISSION
Docket Number 15-OIR-01

October 2, 2015

INTRODUCTION

This document is the Final Statement of Reasons (FSOR) and Updated Informative Digest required by Government Code sections 11346.5(a)(19), 11346.9, and 11347.3(b)(2). The original proposed language and the final adopted language cover the Energy Commission's power plant licensing processes and general commission-wide process and procedures.

PROCEDURAL HISTORY OF THE RULEMAKING

On April 24, 2015, the Office of Administrative Law published a Notice of Proposed Action (NOPA) concerning the potential adoption of proposed amendments to the commission's siting and process and procedure regulations (Express Terms or 45-Day Language). The NOPA and 45-Day Language were also posted on the Energy Commission's website for docket number 15-OIR-01 on April 20, 2015. The notice set a hearing and adoption data for June 10, 2015.

On May 13, 2015, the Energy Commission published and posted on its website an amended Notice postponing the hearing and adoption date until July 8, 2015.

On July 1, 2015, the Energy Commission published and posted on its website a Notice for the availability of amendments to the express terms (15-day language) and postponement of the hearing and adoption date until July 30, 2015.

On July 28, 2015, the Energy Commission published and posted on its website a Notice for the availability of supplemental amendments to the express terms (supplemental 15-day language) and postponement of the hearing and adoption date until September 9, 2015. Supplemental information including the purpose, rationale and necessity of the additional changes was also published.

On September 9, 2015, after a hearing on the supplemental 15-day language and consideration of public comments, the Energy Commission adopted the amended language and a notice of exemption from the California Environmental Quality Act.

UPDATED INFORMATIVE DIGEST (Gov Code Section 11346.9(b))

In accordance with Government Code section 11346.9(b), the Informative Digest contained in the NOPA is incorporated by reference. There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the NOPA.

UPDATE TO THE INITIAL STATEMENT OF REASONS (Gov Code Section 11346.9(a)(1))

Government Code section 11346.9(a)(1) requires the FSOR to contain an update of the information contained in the initial statement of reasons. Other than those changes noted below, no other changes to the Initial Statement of Reasons are necessary, and those items not addressed are hereby incorporated by reference.

The Initial Statement of Reasons contained the purpose, rational and necessity for each of the amendments to the regulatory language. The 15-day language contained changes to section 1211.7(e) and 1745.5(d) based on comments received. The changes were shown in double underline and double strikeout compared to the single underline and single strikeout of the original proposed changes in the express terms.

1211.7(e) ~~Any petitioner who has been denied leave to intervene by the presiding member,~~ Any ruling on a petition to intervene, may be appealed, by the petitioner, ~~may appeal the decision~~ to the full commission within ~~fifteen (15)~~ 10 days of the ruling. ~~denial.~~ Failure to file a timely appeal will result in the presiding member's denial becoming the final action on the matter.

~~1745.5(d) Any governmental agency may adopt all or any part of a proposed decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency.~~

See response to comments, Attachment A, for the reasoning supporting the 15-day language changes.

The supplemental 15-day language made additional changes to the original express terms, sections 1104(e), (f); 1208.1(e), (e)(1), (e)(2); 1211.5(c); 1212(b)(1)(D), 1212(b)(3), 1212(c)(2); 1240(d)(1), 1240(g), 1240(h)(1), (2). See Attachment B for the text and purpose, rationale and necessity for the supplemental 15-day language.

MATERIALS RELIED UPON THAT WERE NOT AVAILABLE FOR PUBLIC REVIEW PRIOR TO THE CLOSE OF THE PUBLIC COMMENT PERIOD (Gov Code Section 11346.9(a)(1))

No new materials were relied upon that were not already identified in the Initial Statement of Reasons and all materials relied upon were available for public review.

INCORPORATION BY REFERENCE OF MATERIAL FROM THE NOTICE OF PROPOSED ACTION (Gov Code Section 11346.9(d))

The 15-Day Language and supplemental 15-day language did not substantially deviate from the originally-proposed text covering the commission's process and procedure regulations; therefore, in accordance with Government Code section 11346.9(d), the Energy Commission determines that this FSOR can satisfy the following requirements by incorporating by reference various parts of the April 24, 2015, Notice of Proposed Action.

- Section 11346.9(a)(2). The Energy Commission has determined that regulations will not impose a mandate on state, local agencies or school districts.

- Section 11346.9 (a)(5). The Small Business Impacts and Economic Impact on Business determinations from the Notice of Proposed Action are incorporated by reference. The Energy Commission has determined that the regulations have no adverse economic impact upon small businesses. Thus, alternatives to lessen any impact were not considered, and none were identified.

- Section 11346.9(c). The relationship to federal law discussion from the Notice of Proposed Action is incorporated by reference.

CONSIDERATION OF ALTERNATIVE PROPOSALS (Gov Code Section 11346.9(a)(4) and (5))

The Energy Commission determined that no alternative before it would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected persons than the adoption of the proposed regulations, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

INCORPORATION BY REFERENCE (1 CCR 20(C))

No documents were incorporated by reference for this rulemaking.

SUMMARY OF COMMENTS RECEIVED AND THE ENERGY COMMISSION'S RESPONSES (Gov Code Section 11346.9(a)(3))

During the rulemaking process there were three comment periods: April 20, 2015 to June 23, 2015 for the original express terms (45-day language); July 1, 2015 to July 20, 2015 for the first set of changes (15-day language); August 11, 2015 to August 28, 2015 for the second set of changes (supplemental 15-day language). In addition, comments were received at the September 9, 2015 hearing.

All comments were reviewed, summarized and responded to in Attachment A. These responses explain how the language was amended to accommodate the comment or the reasoning for rejecting the comment.

FINAL STATEMENT OF REASONS
ATTACHMENT A
RESPONSE TO COMMENTS

Comments from the Office of County Counsel County of Riverside

Comment: *While we recognize the commission's need to establish a defined comment period on staff assessments, as being proposed in section 1742, we are concerned that a minimum thirty day public comment period will not be sufficient. Staff assessments are often in excess of a thousand pages. The County of Riverside (County) has several different, distinct departments that must evaluate power plants as a whole and review the staff assessment and proposed power plant conditions of certification as they relate to County laws, ordinances, regulations and standards (LORS).*

Comments and proposed conditions from County departments on staff assessments are normally adopted by our Board of Supervisors at a public meeting. Reviewing the lengthy staff assessments, preparing comments, and having those comments considered and approved by our Board of Supervisors at a public meeting in a short thirty day timeframe is problematic. We respectfully request that proposed section 1742 be revised to include a public comment period of at least 45 days or such additional time as required by the presiding member.

Alternatively, we propose that section 1742 be revised to make clear that any comments submitted by a local agency after the close of the public comment period shall be considered by the commission and not rejected. We further request that section 1742 be revised to state that when comments are submitted by a local agency after the close of the public comment period, responses to such comments shall be included in the final staff assessment or in a separate addendum to the final staff assessment.

Response: The collaborative effort between commission staff and local agencies begins well before any Staff Assessment is published and starts under section 1714.5, which provides opportunity for local agencies to comment on the project's application and to inform commission staff of concerns. Section 1742(a) states that *staff shall consult with local…agencies…in environmental, health, safety and reliability matters related to the application*. Staff typically works closely with local jurisdictions and other state agencies, in the drafting of the Staff Assessment to ensure accurate discussion of local laws relevant to the project and other environmental issues. It is fully expected that by the time any Staff Assessment is published, the relevant county agencies would have already had months of dialog with commission staff beyond any scheduled public workshops and would be familiar with the contents of the Staff Assessment and recommended mitigation.

Under section 1742(c), the 30 day public comment is a minimum time period and the presiding member can provide for a longer comment period. Thirty days is adequate time to evaluate most cases given the total process of site visits, workshops and discovery found in the commission's project review process. For more complex cases, it is reasonable to anticipate longer comment periods, but it is not necessary to make the default period greater than 30 days.

Given the opportunity available for local agencies to engage with staff on the development of the Staff Assessment and the ability of the presiding member to extend the comment time frame, staff does not believe the requested language changes are necessary.

Comments from California Unions for Reliable Energy and Center for Biological Diversity

Comment: *Section 1211.7 allows the commission to limit intervenor participation in commission proceedings. Specifically, section 1211.7(c) permits the commission to "impose reasonable conditions on an intervenor's participation, including, but not limited to, ordering intervenors with substantially similar interests to consolidate their participation or limiting an intervenor's participation to specific topics."*

Response: While the new language in 1211.7(c) is more explicit, the underlying substance of the provision is consistent with the current language. The new language does not expand the on the existing authorities of the presiding member, but is meant to provide more awareness and visibility of the authorities that currently exist. The presiding member has always had the authority to limit intervenor participation to ensure an orderly and efficient proceeding and has at times exercised such authority, usually by limiting the scope of intervention or asking intervenors to coordinate questions. The identified limitations are consistent with language in the Administrative Procedures Act, Government Code section 11440.50. The additional clarity is beneficial to those considering intervention to better understand what limitations are possible. Staff does not anticipate a significant change in practice regarding intervention in siting cases. Staff does not believe additional changes to the proposed language are necessary.

Comment: *Section 1211.7(e) contains a new revision (not included in the previous drafts of proposed revisions) which allows any party to appeal any ruling on a petition to intervene. In other words, a presiding member's grant or denial of intervention could be appealed. This is significant departure from longstanding commission policy and procedure where only a petitioner who has been denied intervention can appeal the denial. The proposed revision will open the door for any party (i.e. a project applicant who, obviously, wants the fewest number of obstacles in the permitting process) to vigorously oppose intervention. The proposed revision would undoubtedly result in unnecessary use of the commission's unlimited time and resources to deal with numerous appeals of decisions to grant intervention.*

Response: The intent of the language change was to clarify the ability of the prospective intervenor to appeal not only full denial of intervention, but also any decision for modified intervention. Staff did not intend to expand the right to appeal to other parties. Staff has corrected this in the 15-day language.

Comment: *Section 1211.7 allows the commission to preemptively cut off a party's rights without justification and allows any party to try to block intervention in a proceeding. Section 1211.7 runs the risk of disfavored parties being excluded from the commission's siting process and creates an unnecessarily laborious intervention process. Section 1211.7 should be revised to allow the commission to take action to limit an intervenor's participation if and when an offensive activity (i.e. an action that is outside of proper activity) occurs. Section 1211.7 should also be revised to include the language in the existing section1207 of the commission's regulations, which provides that only a petitioner who has been denied intervention may appeal the denial.*

Response: While the new language in 1211.7(c) is more explicit, the underlying substance of the provision is consistent with the current language. The presiding member has always had the authority to limit intervenor participation to ensure an orderly proceeding and has at times exercised such authority.

The additional language clarifies that in some cases, limitations on intervention may be imposed. The identified limitations are consistent with language in the Administrative Procedures Act, Government Code section 11440.50. The additional clarity is beneficial to those considering intervention, and staff does not believe additional changes are necessary. Staff did not intend to expand the right to appeal to other parties. Staff has corrected this in the 15-day language.

Finally, regardless of one's status in the proceeding, i.e., as a full or limited intervenor, one can always submit public comments and attend all public workshops and hearings. Denial of intervention is not denial of public participation.

Comment: *Proposed Amendments in sections 1212(b)(1)(A) and (B) and 1212 (c)(2) only allow public comments to be included in the hearing record and relied on in a commission decision if the comments are: (1) accepted by the commission at a hearing; (2) the commission provides notice of its intent to rely on the comments "at the time the comment is presented;" (3) parties have "an opportunity to question the commenter;" and (4) parties have an "opportunity to provide rebuttal evidence." As we previously explained, the Proposed Amendments to section 1212 effectively eliminates the ability of a member of the public who is not a party to submit written comments into the "hearing record" on which the commission bases its decision. Further, the combined effect of Proposed Amendments to sections 1211.7 and 1212 on public participation is far too limiting. Section 1212 essentially says that the commission will not consider public comments as a basis for its decisions. As a result, there is little room left for meaningful public participation. Section 1212 is flatly inconsistent with CEQA and the Bagley-Keene Act. First, section 1212 is inconsistent with CEQA because public participation is an essential part of the CEQA process.*

Response: Staff agrees with the comment that public participation is an essential part of the CEQA and commission process and is why the new language was developed; to clarify the hearing record and enhance the effectiveness of public participation.

Under section 1212, public comment becomes part of the hearing record by three mechanisms; 1) previously filed comments can be received into evidence at the hearing, 2) oral comments made at the hearing and 3) comments and staff's response to those comments in the Staff Assessment. None of these three mechanisms entail specific notice to the parties, rebuttal evidence or any type of cross examination. As in current practice, these public comments will be part of the hearing record and can be considered by the commission when developing a decision to supplement other information in the hearing record, but cannot be the sole basis of a finding.

Section 1212 is not inconsistent with CEQA or the Bagley-Keene Act and in many cases goes beyond the public participation requirements found in those laws. For example the commission typically allows intervention in a proceeding which is not a feature found in CEQA or Bagley-Keene.

To enhance the ability for the commission to utilize information from the public, a provision was added which allows, in certain circumstances, public comment to be the basis for a finding. In the specific instance where information provided by a member of the public may be used to as the basis of a finding, then the requirements of notice, questioning and rebuttal are triggered. Staff believes that in most cases information from the public will relate to, and supplement, other information already in the record, therefore the additional procedural triggers will not be routinely necessary. But the objective is to allow a mechanism for that instance when new and not previously discussed information is presented by a member of the public. Therefore, staff does not believe the suggested edits are necessary because the commenter did not correctly characterize the proposed language.

Comment: Section *1212 would allow the commission to exclude a member of the public from submitting written comments into the hearing record. This section cannot be reconciled with CEQA.*

Response: This is an incorrect statement of the proposed language which is almost identical with the existing language. Under section 1212, public comment becomes part of the hearing record by three mechanisms; 1) previously filed comments can be received into evidence at the hearing, 2) oral comments made at the hearing and 3) comments and staff's response to those comments in the Staff Assessment. As in current practice, these public comments will be part of the hearing record and can be considered by the commission when developing a decision to supplement other information in the hearing record. Staff does not believe additional edits to the language are necessary.

Comment: *California Unions for Reliability Energy make a number of other comments including that section 1212 is also inconsistent with CEQA because to seek judicial review of agency actions for alleged violations of CEQA, aggrieved parties must first exhaust their administrative remedies by either orally or in writing presenting their specific objections to the agency prior to the close of the record. Thus, a challenger's oral and written objections to an agency's action or decision must be included in the record.*

Section 1212 is inconsistent with the purpose of the Bagley-Keene Act, which protects the rights of citizens to participate in State government deliberations. Section 1212 must be revised to provide that the "hearing record" will automatically include all public comments filed prior to the close of the "hearing record." Further, section 1212 should be revised to provide that the commission's decisions must be based on the whole record, including public comments submitted prior to the close of the record, as required by CEQA. Failure to make this change would result in the commission's process no longer being a CEQA functional equivalent process.

Response: The commission's regulations do not limit public participation. Under section 1212, public comment becomes part of the hearing record by three mechanisms; 1) previously filed comments can be received into evidence at the hearing, 2) oral comments made at the hearing and 3) comments and staff's response to those comments in the Staff Assessment. As in current practice, these public comments will be part of the hearing record and can be considered by the commission when developing a decision to supplement other information in the hearing record.

Staff considered the concept of allowing all documents filed in the proceeding, including public comment, being automatically part of the hearing record but concluded that this practice would have many disadvantages which outweighed any benefit of simplifying the document management process of the proceeding. Thus a decision was made to continue with the current practice of utilizing a hearing record which is a subset of all the materials filed in the proceeding.

To ensure the information in the hearing record is relevant to the project, there needs to be some narrowing of materials from the entire body of documents filed in the proceeding. For many siting cases, project changes make earlier documents irrelevant and these documents should not be included in the hearing record because they no longer address the final elements of the project. By including such documents, the record becomes cluttered which can cause confusion with the public. A hearing record that contains the relevant project-related documents, the relevant analysis of the documents and the relevant public comments will ensure a comprehensive and focused hearing record. For complex projects with many project changes that take multiple years to process, the use of a more refined hearing record is especially important. This practice is fully consistent with CEQA because there is ample opportunity for public comment that will be included in the hearing record.

It should be noted that before there are any evidentiary hearings, the public has multiple opportunities to provide input t on the development of the staff assessment by participating in the initial project hearing\site visit and data response issue resolution workshops, as well as submitting comments on the project during the period leading up to the publication of the staff assessment.

Finally as prescribed in section 1745.5, the commission's decision is based on the entire or whole hearing record. Staff does not believe additional edits to the language are necessary.

Comment: *Section 1742(d) states that if a project does not comply with all applicable federal, state, regional and local laws, ordinances, regulations and standards, "the staff assessment shall provide a description of all staff efforts with the agencies responsible for enforcing the laws, ordinances, regulations and standards, for which there is noncompliance, in an attempt to correct or eliminate the noncompliance." As we previously commented, all staff communication with agencies responsible for enforcing LORS – not just communication in the case of noncompliance -- should be included in the record. Consider, for example, an instance when an agency responsible for enforcing LORS mistakenly concludes that a project complies with LORS. All parties and the public should have the opportunity to scrutinize that determination. Thus, section 1742(d) should be revised to require that a description of all staff communications (or "efforts" as it is now phrased in the Proposed Amendments) with agencies responsible for enforcing LORS be included in the record.*

Response: Section 1742(d) specifically addresses Public Resources Code section 25523(c) that requires a consultation with the local or regional agency if the project is in noncompliance with a local or regional ordinance or regulation in an effort to correct or eliminate the noncompliance. Section 1742(d) is the reporting procedure that evidences the consultation effort. As part of staff's assessment with the project's compliance with local laws and regulations, information provided by local agencies confirming compliance is typically included in the staff assessment, or is discussed at workshops where local agencies generally participate. Other communications, such as agency letters, would be posted on the commission's website and identified in the docket log. Given the wide availability of information concerning staff's engagement with local agencies, staff does not believe changes to section 1742(d) are necessary.

Comment: *The proposed new section 1234, which provides a process to seek a commission determination as to whether a proposed activity falls under the commission's jurisdiction, leaves no room for public participation. Rather, section 1234 contemplates participation only by the commission and the person seeking the jurisdictional determination.*

Unfortunately, the Proposed Amendments continue to exclude the public from jurisdictional determinations. We reiterate that public participation in jurisdictional determinations has been, and should continue to be, an important part of commission policy and practice. In fact, it was through public participation that the criteria in what is

now section 2003 of the commission's regulations were established, including the determination of generating capacity of an electric generating facility, the maximum gross rating of the plant's turbine generator(s) and the minimum auxiliary load.

Response: Assessing jurisdiction is typically an agency function, impacting a specific person or entity, which invokes an internal legal or technical assessment of a proposed activity. While the public cannot be a party in the initial assessment, interested parties can review filed requests for jurisdictional determinations and submit comments for consideration by staff. If the applicant appeals a decision, a hearing will result and this will provide additional opportunity for public participation, including potential intervention.

The outcome of the jurisdictional determination does not preclude the full participation by the public in any proceedings that follows the determination, whether at the commission or before some other governmental entity. If a member of the public believes an entity is subject to commission jurisdiction, they could submit a request for investigation. Staff does not believe any changes to section 1234 are necessary.

Comment: *Proposed Amendments section 1745.5(d) states: Any governmental agency may adopt all or any part of a proposed decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency.*

Under CEQA, a responsible agency cannot approve a project until it has considered the project's environmental effects as described in a certified final environmental impact report. Under the commission's CEQA certified regulatory program, a proposed decision is not equivalent to a final EIR certified by a lead agency. Rather, a proposed decision is one commissioner's opinion which may be revised and which is not approved, adopted or certified by the commission. The commission certifies the environmental analysis when it adopts a Final Decision that contains the requisite CEQA findings. Thus, it is the commission's Final Decision and associated findings adopted by the full commission to certify the environmental analysis that will satisfy the responsible agency's obligations under CEQA.

To comply with CEQA, section 1745.5(d) must be revised to state: Any governmental agency may adopt all or any part of a proposed decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency.

As we previously stated, it may be that the actual goal for this revised regulation is to inform other agencies who are not acting as responsible agencies but are instead acting as lead agencies for an approval that is related to the project under review that they may utilize the work of the commission when doing their own, independent analysis. If so, the regulation should be redrafted to make this clear.

Response: Because Public Resources Code section 25519(c) addresses the use of commission documents by other agencies, the proposed provision has been removed in the 15-day language.

Comments from the Independent Energy Producers

Comment: *Section 1231, which addresses requests for investigation of alleged violations of statutes, regulations, orders, programs, or other matters within the CEC's jurisdiction, should contain a requirement that the allegations be supported by a declaration under penalty of perjury or some other type of attestation.*

An allegation that a project is not operating in compliance with all applicable laws, ordinances, regulations and standards and request for investigation is a serious matter. In some cases, a request for investigation can put a project's financing at risk. Given the potential harm to a project owner's reputation and the project's financing from meritless claims, the person requesting an investigation should, at a minimum, be required to declare under penalty of perjury that their allegations are true and accurate.

Response: The new request for investigation and complaint process strives to provide a more structured means for members of the public to notify the commission of an issue. While commission staff is subject to being contacted with questions and concerns on a number of issues, the Request for Investigation provisions add additional structure so that a member of the public can understand what to expect from the commission in processing the request, what the end results may be, and have an assurance some action will be taken. Despite a level of structure and process greater than simply calling or emailing the commission with a concern, staff does not believe any type of attestation is necessary for a number of reasons.

The Request for Investigation process is designed to allow for quick disposal of meritless or simple requests. Section 1231 requires the requester to provide specific information, at some detail, which provides a deterrent for false requests. The commission is not likely to spend time investigating the requester's state of mind and knowledge when a request was made, therefore limiting the value of an attestation. Finally, it is staff's experience that most concerns brought up by the public do have merit and it is rare that the commission's process would be hijacked by a baseless request. In addition, the new complaint process squarely places the decision of filing and prosecuting a complaint with the commission and not with a requesting party. Thus, there is an additional level of protection against meritless actions. Staff does not believe changes to the language are necessary.

Comment: *Section 1232 should be revised to require that the Executive Director provide notice to the subject of a request for investigation of the requested investigation. Such notice is essential to protect the due process rights of the subject of a request for investigation. In addition, any written response of the executive director and any final*

action summaries closing the matter should also be provided to any party that is the subject of the request.

Response: Staff does not believe such a requirement is necessary. As a practical matter, as part of the investigation, it is likely the potential violator would be contacted and told of the request. However, that may not always be the case. Many requests may be quickly resolved with little need to notify the subject of the request. In other cases, early notification could prejudice the investigation. Because each request is different, a set rule requiring notification is not appropriate. This is especially so given that the request for investigation does not impact any rights of the potential violator.

Such impact to rights, including the imposition of fines, loss of certification, or removal of products from sale in California, would require procedures set forth in the complaint process. Under those procedures, there is ample opportunity for the respondent to offer information in its defense at a hearing. The Request for Investigation is designed primarily as a means to allow the public to provide concerns to the commission. It should be noted that requests for investigations submitted to the commission are still subject to the Public Records Act which governs disclosure of public documents.

Section 1232(b) does provide for the final response from the executive director to be filed which would thus be provided to the subject of the original request for investigation.

Comment: *The proposed revisions would allow for automatic inclusion of Staff's documents in the "hearing record" (as defined in the regulations), even if there are no witnesses to sponsor the document and no witness is made available for cross-examination on the contents of the Final Staff Assessment ("FSA"). No other parties would be afforded the right to have their testimony admitted automatically, without any review or cross-examination.*

The commission's regulations provide that Staff's position in siting proceedings is as an "independent party." All parties to siting proceedings should be placed on equal footing, entitled to the same rights and bearing the same responsibilities. Consistent with the basic tenets of due process and fundamental fairness, the Final Staff Assessment and any supplemental assessments should be sponsored by a testifying witness and subject to cross-examination before the testimony becomes a part of the hearing record – just like the testimony of all other parties.

Response: Staff has made changes, as issued in the supplemental 15-day language, to address concerns raised by IEP. As an initial matter, commission staff is different from other parties and has certain rights and obligations other parties do not have. Staff must produce an environmental analysis, engage other agencies, consult with relevant tribes, have access to certain confidential information, ensure public transparency, schedule public events, ensure proper noticing, and coordinate with the Pubic Adviser, among other activities. In addition, staff does not have to request to intervene in a case while other parties do.

One strategy to enhance staff's role as an independent technical expert tasked with providing a neutral environmental assessment is to move away from the Staff Assessment as being a collection of separate sections representing testimony of specific authors, to a single document that represents staff's collective independent technical finding. This would be similar to an Environmental Impact Report being a unified staff document. Under the Public Resources Code section 25519(c), the commission is tasked with developing the independent assessment; there is no requirement that there be any procedure to enter it into a record or that the assessment be subject to the same requirements of other submitted documents.

The inference in the comment that there may be no witness available to question regarding the content of the Staff Assessment is misleading. While the Staff Assessment is automatically part of the record, this does not mean other parties cannot provide contrary information or question the staff person most knowledgeable on a particular topic or sub-topic. As is currently the case, the staff person most knowledgeable will be provided as needed to respond to questions on the content of the assessment.

Language has been added to clarify that in the unlikely event no staff witness is produced, than the relevant portion of the staff assessment can only be used as comment and cannot independently support a finding.

Comment: *IEP remains concerned regarding the proposed use of public comment -- standing alone -- to support a finding by a committee or commission as proposed in revised section 1212(c)(2). Public comment is intended to be just that – the public's opportunity to comment. Public comments are made without the rights, duties, and obligations of a party who intervenes in a proceeding. Elevating "public comment" to the same evidentiary value as sworn testimony given under oath and subject to cross examination is contrary to fundamental fairness and the due process rights of the parties.*

Public speaking can be intimidating under the best of circumstances. The commission's current practices and procedures are to be applauded for both affording the opportunity for public comment and for creating an open forum for those who might otherwise be reticent to speak in public, because the public knows that such comment will be received without questioning or interruption by other parties.

On the other hand, elevating public comment to the same status as sworn testimony and allowing it to become the basis for a finding changes that dynamic, and does irreparable harm to the process. This change will compel other parties to question and cross-examine public commenters in order to preserve the integrity of the evidentiary record, and will create a different tone during public comment periods. It is inevitable that the dynamics of the public comment process during a siting process will change if public commenters become subject to questioning or cross-examination. IEP is concerned about the potentially chilling nature of such a changed dynamic on public comments, in addition to other potential repercussions such as the extended duration of

hearings to allow parties to test the information presented by the public commenter, and if needed, present rebuttal evidence.

Response: Staff does not agree with IEP's comments and specifically disagrees with the contention that public comment is being elevated or that parties will be compelled to cross examine commenters. In the vast amount of cases, the public commenting process will be the same has it has been.

One of the innovative features of the proposed language, is recognition that members of the public have factual information that could be the basis of a finding but which was not previously addressed by any of the parties. Rather than labeling the information as public comment and moving on, the committee can provide notice to the parties and the newly presented information can be more appropriately analyzed. This ensures a decision on the most complete information, while ensuring all parties receive appropriate due process. Staff does not believe this new provision will cause any changes to the typical hearing or result in any change on how public comment is done, except perhaps encourage parties to pay more attention to comments.

The primary purpose of this change is to provide a mechanism for the committee to utilize certain public comments to form the basis for a finding and enhance the completeness of the overall record. The language has been carefully crafted with input from stakeholders to ensure there are no surprises to the parties and that hearings can be completed in a timely manner.

Comment: *We recommend that section 1701 of the rules expressly state that any revisions of the rules will be applicable to notices of intent, applications for certification and petitions for modification filed on or after the effective date of the new regulations to avoid any possible confusion or delay regarding the applicability of the regulations to pending proceedings.*

For example, we would not want to see a Proposed Decision prepared under the existing rules in a pending proceeding is withdrawn or delayed because it does not contain all of the elements as set forth in revised section 1745.5. This type of confusion can be avoided, if the revised regulations are expressly made applicable to applications, notices or petitions for modification filed after the effective date of the new rules. To make the revised regulations applicable to pending proceedings will not just create confusion in the proceeding, but will also subject commission decisions to unnecessary risk of being overturned.

Response: Staff believes that allowing existing proceedings to be governed by one set of regulations while other filings are governed by the new regulations will result in unnecessary confusion. This is especially so in the context of siting cases which may span multiple years.

While the commenter is concerned with a hypothetical procedural liability, staff notes that implementation of the new regulations would not require portions of the proceeding

that were already completed to be redone. So while the new regulations will apply to existing proceedings, the new regulations would not apply retroactively to components of the proceeding that have already passed or have been completed. This is consistent with the general rule that new laws are not applied retroactively.

In *United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79–80, 103 S.Ct. 407, 412–413, 74 L.Ed.2d 235 Justice Rehnquist succinctly captured the well-established legal precepts governing the interpretation of a statute to determine whether it applies retroactively or prospectively, explaining: "*The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This court has often pointed out: '[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past*.... The rule has been expressed in varying degrees of strength but always of one import, that *a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.*"

California authorities have long embraced this general principle. As Chief Justice Gibson wrote for the court in *Aetna Cas. & Surety Co. v. Ind. Acc. Com.,* supra, 30 Cal.2d 388, 182 P.2d 159—the seminal retroactivity decision noted above—"[i]t is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*30 Cal.2d at p. 393.)* This rule has been repeated and followed in innumerable decisions. (See, e.g., *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 884, 221 Cal.Rptr. 509, 710 P.2d 309; *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App.3d 263, 272, 209 Cal.Rptr. 266. See generally 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, section 288, pp. 3578–3579.)

Consistent with California law, new requirements approved in the revised regulations shall not be applied retroactively to any completed portion of a proceeding. For example in a siting case after a finding of data adequacy pursuant to section 1709, the commission's power plant siting activities are generally comprised of three distinct phases: (1) the Discovery Phase, the proceedings up to and including the close of discovery pursuant to section 1716; (2) the Evidentiary Phase, the proceedings between the close of the Discovery Phase and the close of evidentiary hearings held pursuant to section 1748; and (3) the Decision Phase, the proceedings from the close of the Evidentiary Phase through the docketing of the commission's Final Decision pursuant to Section 1720.4.

In order to avoid retroactive application of the revised Regulations, it is the intent of the commission as follows: (1) changes to the regulations related to the Discovery Phase shall not be retroactively applied to pending proceedings that have completed the Discovery Phase; (2) changes to the regulations related to Evidentiary Phase shall not be retroactively applied to pending proceedings that have completed the Evidentiary Phase; and (3) changes to the regulations related to Decision Phase shall not be retroactively applied to pending proceedings that have completed the Decision Phase.

The commission intends to implement this prohibition against retroactive application through a general order for all proceedings prior to the effective date of these Regulations, and through specific orders in matters pending on the effective date of the revised Regulations.

In the event there is some issue with integrating an existing proceeding with the new regulations, the presiding member can always manage the proceeding in a way that is fair to all parties and make the appropriate adjustments. Staff carefully went through the regulations to identify changes that could present an issue during the transition to the new language and could not find any changes that would result in delay or legal risk to a proceeding.

Comment: *IEP recommends that section 1742 of the commission's regulations should neither mandate preparation of both a preliminary and final staff assessment nor provide specific comment deadlines. The proposed amendments mandate both. In certain cases, a two-step process may be unnecessary, and there is simply no reason to impose a mandatory publication of two Staff documents, especially when evidentiary hearings and plenty of other process follows publication of the Staff's assessment.*

Moreover, it is unnecessary to mandate specific comment periods in these rules. Where matters are uncontested or where urgency warrants, such mandatory time periods will cause unnecessary delay. IEP recommends that the commission retain the flexibility of section 1747 in its current form, and allow the presiding member of a committee to establish an appropriate schedule that corresponds to the size of the project, the complexity of the issues, and the extent of public interest or controversy.

Response: Staff agrees that in some cases one Staff Assessment is appropriate and under the proposed language, one document can be drafted. In appropriate cases, the Preliminary Staff Assessment and the Final Staff Assessment can be essentially the same document with the Final Staff Assessment simply including responses to any comments. If no comments are received than the preliminary becomes the Final Assessment.

Having a specifically identified comment period with a clear mechanism for responding to those comments was advocated by a number of stakeholders. In addition, a comment period on the Staff Assessment provides a firm time frame for those who want to participate but have limited resources and want to make the most of it. A clear comment period also serves to structure the process so that there is a defined time staff can commit to responding to the comments. Staff also expects that having a comment period earlier in the process will reduce the number of comments on the presiding member's proposed decision. Given the demand for a clear comment period and the other benefits, staff does not believe additional changes to section 1742 are necessary.

Comments from the Colorado River Indian Tribes

Comment: *The Colorado River Indian Tribes submit that only consultation between decision makers (rather than with staff) can respect the sovereignty of Indian nations. Consequently, the commission cannot delegate consultation to its staff and act consistently with Public Resources Code section 1080.3.1 and Government Code section 65352.4.*

The revised regulations do not provide a clear or automatic mechanism for protecting the confidential nature of sensitive cultural material shared with the commission during a siting proceeding.

Response: Staff is aware of the tribes desire to have the ex parte rules waived so that tribal leaders can talk directly to commissioners on specific licensing cases. Such action is outside the scope of this rulemaking. The prohibition of contact with decision makers in adjudicative proceedings is based on statute and cannot be changed by regulation. (See Government Code section 11430.10) In adjudicative proceedings the staff is tasked with and has the expertise to perform the requirements of tribal consultation. The tribe does have an opportunity to engage with decision makers by filing materials in the docket and to participate in hearings.

Tribes can meet with commissioners and hold general discussions on tribal issues and concerns as long as those discussions are not specific to any particular active adjudicative proceeding before the commission.

The specific procedures of consultation and confidentiality are outside the scope of this rulemaking. The commission's confidentiality process can be found at section 2505.

Comments from John McKinsey

Comment: *When a project owner petitions the commission to amend a licensed thermal power plant project, it acts as a petitioner. A petitioner is a party. Accordingly, we suggest adding "petitioner" to the definition of "party."*

Response: Staff does not believe this change is necessary because section 1769 which addresses post certification amendments uses the term "applicant" and not petitioner.

Comment: *An intervenor is a party to commission proceedings. Intervention status not only accords rights upon the party, it also imposes duties as well. When an intervenor fails to fulfill its duties as a party, the presiding member should be allowed to place subsequent limits on the intervenor's scope of participation.*

The presiding member may grant intervention and may impose reasonable conditions on an intervenor's participation, including, but not limited to ordering intervenors with

substantially similar interests to consolidate their participation or limiting an intervenor's participation to specific topics. An intervenor is a party to a proceeding. Subsequent to the time when a petition to intervene is granted, the presiding member may, upon its own motion or the motion of a party, impose reasonable conditions on the participation of an intervenor who fails to fulfill its duties as a party.

Response: Staff does not believe this additional language is necessary as the presiding member already has the authority to modify intervention and parties can file motions requesting action be taken (See section 1211.5).

Comment: *The revisions in the draft rules would require every project to go through both a preliminary staff assessment and a final staff assessment. While many power plant siting projects require both a preliminary and a final staff assessment, certain projects might be simple enough that a single staff assessment should suffice. Requiring both a preliminary and a final staff assessment on such projects only serves to lengthen the period of review and does so without good reason. We recommend the addition of a sentence authorizing the Presiding Member of the Siting Committee to waive the requirement of a preliminary staff assessment where the Presiding Member concludes a preliminary staff assessment would not add significantly to the quality of the Staff's review process nor hinder public involvement.*

Response: Staff agrees that in some cases one Staff Assessment is appropriate and under the proposed language, one document can be drafted. In appropriate cases, the Preliminary Staff Assessment and the Final Staff Assessment can be essentially the same document with the Final Staff Assessment simply including responses to any comments. If no comments are received than the preliminary becomes the Final Assessment.

Comments from Michael Garabedian

Comment: *Solar energy projects before the CEC are a game changer requiring new emphasis because of extensive project land area coverage. Because of this, the need for land based physical and biological including ecological science including basin to and from range, ecosystem and whole desert bioregion science is unmistakable. Further, there are no state air board, water board, etc. bodies to address arid land impacts such as the biological soil crusts (BSCs) from Nevada to the coastal scrub.*

Response: This comment does not directly relate to the proposed regulatory language which covers process and procedure and not the technical analysis used by commission staff to evaluate the impacts of proposed projects on soil crusts.

Comment: *Section 1742(a) to "agencies" to consult should be "entities," and to the list of areas of expertise or interest should be added, "Biological and physical sciences including ecology." Large scale land based energy production requires scientific input. The two DRECP independent science panel reports demonstrate the commission has*

little or no effective ability to bring science to bear on renewable energy planning or projects.

Response: This comment does not directly relate to the proposed regulatory language which covers process and procedure and not the technical analysis used by commission staff to evaluate the impacts of proposed projects.

Commission staff does consult with a variety of different experts as necessary to develop its independent analysis. Agencies are specifically called out due to the statutory requirement for the commission to engage other public entities that have expertise regarding the proposed project. Biology staff frequently consults with experts from California Department of Fish and Wildlife, United States Fish and Wildlife Service, Bureau of Land Management and other local agencies when evaluating the environmental impacts of proposed energy projects. Staff is also able to consult with outside experts as necessary.

Comment: *1742(b). After effects insert "and scientific issues" of a project. 1745.5. Insert a new (b)(3) Biological and physical including ecological scientific issues.*

Response: This comment does not directly relate to the proposed regulatory language which covers process and procedure and not the technical analysis used by commission staff to evaluate the impacts of proposed projects. The suggested language is not necessary as staff already includes ecological assessments in its impact analysis.

Comment: *1212(c)(2). The sentence here on the use of public comment in effect prohibits basing a finding on public comment unless it is determined at the time that the comment is made that the comment may be so used. The hearing entity may not know this at the time and should not be precluded to acting later to use public comment for this purpose, so notice at the time should not be required. A later determination that this kind comment may be used should be followed at that time by appropriate opportunity to provide rebuttal evidence or to request opportunity to cross examine if necessary.*

Response: Staff agrees that information presented at a hearing should be usable later in the proceeding if necessary. The committee can always reopen the record and allow additional information to be submitted or hold supplemental hearings to further investigate new information. No additional language changes to section 1212 are necessary to allow such committee actions.

Comment: *1212(c)(3) requires a very high knowledge on the part of the public about what may be allowed as hearsay and how to lay a foundation for the use of hearsay that is permitted. The proposed language is in effect illusory for the general public. The public interest requires wider acceptance, especially in the case of local knowledge and facts that an applicant or staff may not know of that an applicant knows but may choose to ignore.*

Response: This is an incorrect understanding of the application of 1212(c)(3). The public does not need to know anything about hearsay; public comment is already part of the hearing record regardless of whether it is considered hearsay in some forums. The primary purpose of public comment is to allow local residents to provide information about local issues.

Comment: *1230, 1231. Public complaints should be allowed without having to allege a violation. The public should be allowed to request a hearing on a complaint and to withdraw that request. 1234. The public should be able to request a jurisdictional determination.*

Response: Section 1230 and 1231 do not prohibit a member of the public from contacting the commission with a concern or issue. Section 1230 and 1231 address a more formal process for when a member of the public believes a violation is occurring. The new process provides a structure for the public to notify the commission of violations but it is an agency function to determine the appropriate type of enforcement. This division benefits the public as they should not have the burden to prosecute a violation.

Assessing jurisdiction is typically an agency function, impacting a specific person or entity, which invokes an internal legal or technical assessment of the proposed activity. While the public does not have a direct role in the determination and cannot be a party, those interested can review filed requests for jurisdictional determinations, submit comments and attend any scheduled hearings. The outcome of the jurisdictional determination does not preclude the full participation by the public in any proceedings that follows the determination, whether at the commission or before some other governmental entity.

If a member of the public believes an entity is subject to commission jurisdiction, they could submit a request for investigation. Staff does not believe any changes to section 1234 are necessary.

ATTACHMENT B

2015 DRAFT REGULATIONS

Purpose, Rationale and Necessity of Supplemental 15 Day Language

Docket No. 15-OIR-1

CALIFORNIA
ENERGY COMMISSION
Edmund G. Brown Jr., Governor

AUGUST 11, 2015

Purpose, Rationale and Necessity of Supplemental 15 Day Language

Supplemental language changes shown in double underline and double strikeout.

§ 1104. Meetings.

(a) Presiding Member. The chairman shall preside over all meetings of the commission at which he is present. In his or her absence, the vice chairman shall preside. If neither the chairman nor the vice chairman is in attendance, the member present who has the greatest seniority on the Commission shall preside. The presiding member may yield the chair.

(b) Robert's Rules of Order. Except as otherwise provided by this article and except when all the members present indicate otherwise, meetings of the commission shall be conducted pursuant to the latest edition of Robert's Rules of Order. Failure to comply with this subsection shall not invalidate any action of the commission.

(c) Order of Agenda. The presiding member may determine the order in which agenda items shall be considered.

(d) Consent Calendar. The agenda may include an item designated "the consent calendar."

(1) The consent calendar shall include only those matters for which there appears to be no controversy. The consent calendar shall contain any such matter specified for inclusion by the person proposing the agenda item. A brief description of each matter on the consent calendar shall be included in the agenda.

(2) At the request of any member, any matter shall be removed from the consent calendar and may be considered at the same meeting as a separate item of business.

(3) After an opportunity for the requests to remove matters from the consent calendar has been given, a vote shall be taken on the consent calendar. If three members vote to approve the consent calendar, each matter on the consent calendar shall be approved and shall have the same force and effect as it would have if approved as a separate agenda item.

(e) Public Comments. Any person may file ~~submit~~ comments in writing on any agenda item. ~~Any person submitting such comments shall, if possible, provide the commission with either twelve paper copies of such comments, or one paper copy and electronic copies in the number, media and format specified in Section 1209.5 in advance of the meeting at which it is to be considered.~~ Unless otherwise directed by

the presiding member, all written comments shall be filed three days before the commission meeting. Any person present ~~and so desiring~~ shall be given an opportunity to make oral comments on any agenda item; provided however, that the presiding members may limit or preclude such comments as necessary for the orderly conduct of business.

(f) The procedures governing motion filing by parties in proceedings before the commission can be found in section 1200 et seq. of these regulations.

Purpose and Rationale: Changes to how documents are filed with the commission and some renumbering of sections require that the language in subsection (e) be updated. The number of copies required is no longer needed so those requirements have been eliminated. More precise language was added regarding the timing for comments. By specifying a deadline for comments, greater clarity is added to the process. In addition, the three day time period allows the commission to be prepared to respond and take action based on the comments.

New subsection (f) cross references and guides parties to the provisions of the regulations related to motions and adjudicative proceedings.

Necessity: The changes are necessary to remove language made obsolete due to updates to document handling procedures, to ensure clarity in the timing of filing comments in advance of commission meetings and guide parties to the section of the regulations relevant to adjudicative proceedings and motions.

§ 1208.1. Media, Format, Content, and Other Required Characteristics of Filed Documents; Electronic Signatures Changes in the Requirements by the Executive Director.

(e) ~~Signatures.~~ Except as otherwise required by the executive director or the presiding member of a proceeding, signatures maybe electronic.

(1) For electronic filings containing a signature, including for submissions into electronic data bases requiring a signature as attestation of information, the signature may be in electronic form and represented as: ~~The signature may be shown on the electronic copy by inserting~~ a scanned signature graphic, a typed in name or by "Original Signed By", "/S/", or similar notation.

(2) In a proceeding, if an electronic copy of an originally signed hardcopy ~~document~~ is filed, the filer must retain the document containing the original signature, and produce it at the presiding member's request, until the commission's final decision in the proceeding is no longer subject to judicial review.

Purpose and Rationale: The new electronic signatures provision required additional language to account for data base submittals used by a number of programs such as Appliance Efficiency and Fuels and Transportation. The language clarifies how

electronic signatures can be used in conjunction with submittals to automated data bases.

Necessity: To maximize the ease and efficiency of data base submissions, language clarifying the ability to utilize electronic signatures and what comprises an electronic signature is necessary.

1211.5. Motions.

(a) Any party may request the presiding member or, where applicable, the commission, to issue orders or rulings, including but not limited to requests to require another person to act or to refrain from acting, or requests for adjudication of procedural or substantive issues. All such requests shall, except as otherwise required by these regulations or allowed by the presiding member, be in the form of a written motion. Motions shall be filed and responded to according to a schedule established by the presiding member. In the absence of such a schedule, responses to motions shall be filed within 14 days of the service of the motions. Unless otherwise ordered by the presiding member, there shall be no replies to responses. The presiding member shall rule on the motion within 21 days of its filing, or a later deadline established by the presiding member; if the presiding member does not rule within 30 days or the time prescribed, the motion is deemed denied.

(b) Requests for action made during any hearing may be made orally to the presiding member and need not be in the form of a written motion. Rulings by the presiding member may be made orally. If the presiding member does not make a ruling on the motion by the end of the hearing, the motion is deemed denied.

(c) A party to a proceeding, currently before the commission for consideration and identified on the commission's agenda, must file any related motion, requiring the commission to take some action, five days prior to the meeting date. Consideration of the motion is at the discretion of the presiding member.

Purpose and Rationale: Subsection (c) provides specific rules for the timely filing of motions by parties for commission consideration at business meetings. Most motions are appropriately heard by committees charged with managing proceedings and the schedule set forth in subsection (a) and (b) will guide parties on the process for filing motions. Currently there are no specific rules for filing motions with the commission related to agenda items on the business meeting. Subsection (c) covers this gap and identifies the deadline for filing. Requiring motions in advance of the commission meeting will allow for the commission and other parties time to review. Since most motions should be filed with the committee, except for specific appeals identified in the regulations which are heard by the commission, the chair may rule not to consider the motion at the commission business meeting to ensure an orderly meeting.

Necessity: The language is necessary to clarify the time table to file motions related to proceedings before the commission at its monthly business meeting. This will

ensure parties do not file motions the day of the business meeting leaving no time for the commission and other parties to assess the motion.

§ 1212. ~~Rules of Evidence.~~ Rights of Parties, Record and Basis for Decision.

(a) Rights of Parties. Subject to the presiding member's authority to regulate a proceeding as prescribed in section 1210, and other rights identified in specific proceedings, each party shall have the right to call and examine witnesses, to offer oral and written testimony under oath, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence.

(b) Record.

(1) The "hearing record", in an adjudicatory proceeding, is all of the information the commission may consider in reaching a decision. The hearing record shall contain:

(A) all documents, filed comments, materials, oral statements, or testimony received into evidence by the committee or commission at a hearing;

(B) public comment offered at a hearing;

(C) any materials or facts officially noticed; and

(D) for siting cases, subject to 1212(b)(3), staff's Final Staff Assessment and any timely filed supplemental assessments.

(2) Parties may move to exclude information from consideration by the commission on the ground that it is not relevant, is duplicative of information already in the record, or on another basis. If the presiding member grants such a motion, the information shall be excluded from the hearing record. While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency, and adequacy of the record.

(3) In a siting case, if a party requests a staff witness be present to sponsor specific portions of the Final Staff Assessment, or any supplemental assessments, and no witness is made available for questioning, the relevant portions of the staff assessment or supplemental assessments at issue shall be treated as comment and shall not be sufficient, in and of itself, to support a finding by the commission.

(c) Basis for and Contents of Decisions.

1) Decisions in adjudicative proceedings shall be based on the evidence in the hearing record, explain the basis for the decision, and shall include but need not be limited to all legally-required findings of fact and conclusions of law.

2) A finding may be based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to relying on in the conduct of serious affairs. Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions. The committee or commission may rely on public comment, standing alone, to support a finding if the committee or commission provides notice of its intent to rely upon such comment at the time the comment is presented, other parties are provided an opportunity to question the commenter, and parties are given a reasonable opportunity, as ordered by the presiding member, ~~the opportunity~~ to provide rebuttal evidence. The committee or commission shall ~~may~~ give appropriate weight to information in the record as allowed by law.

3) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

Purpose and Rationale: These changes clarify that while the staff assessment is automatically in the hearing record, if a staff witness is requested to sponsor a particular portion of the staff assessment, and no witness is provided, than the portions at issue cannot be used to support a finding. This procedural fact is made clear by adding new subsection (3) and by citing to subsection (3) in section 1212 (b)(1)(D). The other changes clarify the opportunity for rebuttal.

Necessity: The language is necessary to address concerns raised by stakeholders regarding how the staff assessment would be treated if no staff witness is produced.

§ 1240. Renewables Portfolio Standard Enforcement.

(a) Notwithstanding anything in this article to the contrary, the following shall apply to any complaint pertaining to a Renewables Portfolio Standard requirement, or any regulation, order, or decision adopted by the commission pertaining to the Renewables Portfolio Standard, for local publicly owned electric utilities.

(b) Complaints

(1) ~~No complaint for the failure of a local publicly owned electric utility to meet a Renewables Portfolio Standard requirement, or any regulation, order, or decision adopted by the Commission pertaining to the Renewables Portfolio Standard for local publicly owned electric utilities, may be filed by any person or~~

~~entity listed in section 1231, except Commission staff.~~ The executive director may file a complaint against a local publicly owned electric utility for failure to meet a Renewables Portfolio Standard requirement, or any regulation, order, or decision adopted by the commission pertaining to the Renewables Portfolio Standard for local publicly owned electric utilities.

(2) A complaint for the failure of a local publicly owned electric utility to meet a requirement of the Renewables Portfolio Standard, or any regulation, order, or decision adopted by the commission pertaining to the Renewables Portfolio Standard for local publicly owned electric utilities, shall include, but not be limited to, the following:

(A) A statement of facts upon which the complaint is based.

(B) A statement indicating the statute, regulation, order, or decision upon which the complaint is based.

(C) The action the commission is requested to take.

(D) The authority for the commission to take such action.

~~(3) A declaration under penalty of perjury shall not be required for the filing of a complaint under this section 1240.~~

(c) Any person or entity may participate in a proceeding filed under this section but shall not be entitled to intervene or otherwise become a party to the proceeding. Participation includes the ability to provide oral and written comments in the proceeding.

(d) Answer

(1) The local publicly owned electric utility shall file an answer with the chief counsel within 45 calendar days after service of the complaint. In addition to those matters set out in section ~~1233 (b)~~ 1233.2, the answer shall include all data, reports, analyses, and any other information deemed relevant by the local publicly owned electric utility to any claims, allegations, or defenses made in the answer. The answer may also include information deemed relevant by the local publicly owned electric utility to support findings of fact regarding any mitigating or otherwise pertinent factors related to any alleged violation or to a possible monetary penalty that may be imposed if ~~for~~ noncompliance is determined pursuant to this section. The information included regarding any mitigating or otherwise pertinent factors may describe all relevant circumstances, including, but not limited to, the following:

(A) The extent to which the alleged violation has or will cause harm.

(B) The nature and expected persistence of the alleged violation.

(C) The history of past violations.

(D) Any action taken by the local publicly owned electric utility to mitigate the alleged violation.

(E) The financial burden to the local publicly owned electric utility.

(2) In the event that the local publicly owned electric utility includes in the answer any confidential business information, trade secrets, or other information sought to be withheld from public disclosure, respondent shall submit such information in a separate filing, under seal, at the time the local publicly owned electric utility files the answer. The information shall be submitted to the executive director along with a complete request for confidential designation in accordance with section 2505.

(e) Response

(1) Commission staff may file with the chief counsel a response to the answer no later than 15 calendar days after receipt of the answer. The response shall be served upon the local publicly owned electric utility upon filing.

(2) In the event that commission staff files a response under (e)(1), the local publicly owned electric utility may file with the chief counsel a reply to such response no later than 10 calendar days from receipt of such response. The reply shall be served upon commission staff upon filing.

(f) Hearing

(1) A hearing on the complaint shall be scheduled to commence no sooner than 30 calendar days after the filing of a staff response pursuant to subdivision (e) of this section.

(2) A notice of hearing on the complaint shall be provided in accordance with section ~~1234 (b)~~ 1233.3(b). Such notice shall be provided no later than 30 calendar days after the last filing is made.

(3) The hearing may be scheduled before the full ~~C~~commission, a committee designated by the ~~C~~commission, or a hearing officer assigned by the ~~C~~chair at the request of the committee as provided in section 1205.

(4) If the hearing is not held before the full commission, the proposed decision set out in section ~~1235~~ 1233.4(a) shall be forwarded to the full commission, to the extent reasonably possible, no later than 45 calendar days after the hearing has been concluded. If the hearing is held before the full commission, to the extent reasonably possible, the commission shall publish its decision within 45 calendar days after the hearing has been concluded.

(g) The decision of the full commission shall be a final decision. There is no right of reconsideration of a final decision issued under this section 1240. The decision will include all findings, including findings regarding mitigating and aggravating factors related to noncompliance. The decision may also include findings regarding mitigating and aggravating factors~~,~~ upon which the California Air Resources Board may rely in assessing a penalty against a local publicly owned electric utility pursuant to Public Utilities Code section 399.30, subdivisions ~~(l) and~~ (m) and (n). The decision may also include suggested penalties for the California Air Resources Board to consider, as appropriate. Any suggested penalties shall be comparable to penalties adopted by the California Public Utilities Commission for noncompliance with a Renewables Portfolio Standard requirement for retail sellers.

(h) Referral

(1) No sooner than five days after the time for filing a petition for writ of mandate in accordance with Public Resources Code section 25901 has passed, commission staff shall forward a notice of violation, based on the final decision of the full commission, together with the record of proceedings, to the California Air Resources Board for determination of a penalty. The record of proceedings shall include all filings made in the course of the proceedings, the transcripts of the hearing and any exhibits used during the course of that hearing, and any correspondence between the respondent and the commission pertaining to the proceedings.

(2) If a petition for writ of mandate is filed by respondent, commission staff shall not forward the notice of violation to the California Air Resources Board until the matter is fully and finally determined. In the event a petition for writ of mandate is filed by respondent, the record of proceedings shall also include all filings made by all parties in the action and any appeals thereof.

Note: Authority cited: Sections 25213 and 25218(e), Public Resources Code; and section 399.30, Public Utilities Code. Reference: Section 399.30, Public Utilities Code.

Purpose and Rationale: These changes were made as part of the section 1240 Renewable Portfolio Standard rulemaking.

Necessity: These changes are necessary to ensure consistency with the 1240 rulemaking currently happening in parallel with this rulemaking.